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Judge:	Teresia Mumbua Matheka
Citation:	Republic v Simon Mugo Kinyanjui [2021] eKLR
Advocates:	Ms Murunga for state
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NUMBER 1 OF 2020**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**SIMON MUGO KINYANJUI.....ACCUSED**

**RULING**

1. The Accused person (Simon Mugo Kinyanjui) is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. It is alleged that on 21<sup>st</sup> December, 2019 at Kisima Stage in Njoro within Nakuru County, the Accused, jointly with another not before court murdered Boniface Kimathi Mugwe.

2. The Accused person pleaded 'Not guilty' and the case proceeded to hearing. The Prosecution called a total of seven (7) witnesses.

3. **PW1 Paul Mbugua Kimani** testified that on 22<sup>nd</sup> December, 2019 at 6:30 am he was rang by his neighbour Muthui who was on his way to town. Muthui told him he had seen the body of his (PW1's) son Boniface Kimathi Mugwe in a ditch. He woke up and went and called his brother David Kimathi, who accompanied him to the scene. On arrival they found the deceased. He was unconscious, unable to talk and bleeding from the head. His clothes were soaked with blood. They were assisted by one Kiihuria who came to put the deceased in the motor vehicle that brought him to Provincial General Hospital in Nakuru where he was admitted to the ward. After scans and X-rays were done he was taken to back the ward then to the Intensive Care Unit (ICU).

4. That at about 4.00 p.m., they were called back and informed the deceased had died. They then went home to Njoro after which they went to the police station to make a report.

5. That the next day he, Sammy Kimathi and David Kimathi then came back to Nakuru Provincial General Hospital Mortuary. They went to the police station in Njoro and were accompanied by the Police to the Mortuary where he identified the body for the postmortem. It was conducted in their presence.

6. **PW2 Moses Mwaniki Ndung'u** testified that on 24<sup>th</sup> December, 2019 he was going home from Maili Tatu at about 11.00 pm. When he reached a place called Stage-Kisima area at (Kamwego), he found three people fighting. These people were known to him as Simon, Boniface and Kamau. When he stopped to find out what had happened, he found out that they were fighting over Kshs. 50. That there was something about the motorbike's side mirror and another who wanted to be paid. He testified that Kamau and Simon were demanding money from Boniface: One concerning his side mirror and one who wanted to be paid. This, he testified was not very clear because there was a lot of shouting. He testified that the three were pulling and pushing and that he witnessed them grabbing one another. He did not see Simon touch Boniface but he saw Kamau and Boniface struggling. That when he arrived, it was these two (Kamau and Boniface) who were struggling, and they even fell.

7. He testified that he was unable to separate them but the other boda-boda riders Fredrick Miriti and Brian Njoroge came and found him, and they assisted him to separate them. Thereafter, Boniface left, the fight broke up and he also left, leaving Simon and Kamau at the scene.

8. That the following day he heard that Boniface never reached home. He had fallen on the road. He later heard that Boniface had died. He said he knew Boniface, Simon and Kamau since they were neighbours.

9. On cross examination PW2 told the court that Simon was not beating Kamau and that he did not see injuries on Boniface when he ran away.

10. **PW3 Peterson Maina Njuguna** testified that on 21<sup>st</sup> December, 2019 he was coming from Maili Tatu to deliver milk at about 10:30 pm. When he reached the stage, he parked his motorbike at Kisima, then went to collect his jerricans. He saw two motorbikes parked there and found three (3) persons demanding money from one another. He knew the three people as Simon, Boniface and Kamau.

11. He told the court that after he went to load his jerricans onto his motorbike he heard what sounded like a quarrel. There was an issue of Kshs. 50; with Simon asking for Kshs. 50 while Kamau was saying that Boniface had broken his side mirror. He then went there to try and separate them because they were now grabbing one another, with Simon demanding and Kamau holding Boniface.

12. That after he moved closer, one Mwaniki, a neighbour alighted from a boda-boda which had two more pillion passengers and the rider after Mwaniki alighted the boda boda left but came back with the rider one Miriti and a passenger, one Njoroge. They too joined in trying to separate the three to establish what was happening. In this melee Miriti was hit with a stone on the shoulder by Kamau. Boniface said he would leave on Miriti's boda-boda.

13. He testified that the struggle became intense and the two boda-boda riders fell. That Simon and Kamau were restraining Boniface from boarding Miriti's Boda-boda. Miriti got hold of Kamau and Boniface and Njoroge were able to run away. He and Miriti then left on their boda-boda as the fight had broken up.

14. He testified that when he took off with Miriti, they left Simon and Kamau at the scene while Boniface ran towards his home. He went on a different route. That the following day he heard that Boniface had been found with injuries, in a bad state and had been taken to hospital in Nakuru. Later that evening he heard he had died. He knew the three (3) of them since they come from the same area.

15. On cross examination, PW3 told the court that Kamau is the one who was violent, demanding to be paid for his side mirror while Simon wanted Kshs. 50 from Boniface by force. He also testified that he did not see Simon beat Boniface and that when Boniface left, he had no injuries. That it was Miriti who held Kamau and enabled Boniface to run. He also testified that he had heard that Kamau was not arrested because he had run away.

16. **PW4 Brian Njoroge** testified that on 21/12/2019, at about 11.00p.m he was with his friend Boniface Kimathi Mugwe. He had rung Boniface in the morning saying that his cousin was coming from Nairobi at 1.00pm. That they went to a hotel at Kisima, where he and Boniface picked his cousin one Nahashon. They then went to Nahashon's place at Kamwago and then to Njoro Roosters, where they drank Keg as they watched TV.

17. That thereafter, they left and got a lift on a 'Comply' motor vehicle. They went to Maili Tatu at 'Shosh Club' at about 10.00 pm. There, they drank more Keg, and it began to rain. They were then rang by one Moses who asked whether they were going home, to which they said "No".

18. That thereafter, Boniface said he was going home and left with Simon while he and his cousin waited for another bodaboda. That when another bodaboda came, he, Mwaniki and Nahashon, alighted at Kisima. They went up to his cousin's gate and left him, then returned to Kisima, where he found Kamau, Simon and Boniface arguing. There was an issue about money and about a side mirror and Simon and Kamau were beating Boniface.

19. He testified that he got hold of Simon, while Miriti held Kamau and they told Boniface to run, upon which he left. That these two then began to beat them, so he ran away and hid. While hiding, he could hear Miriti screaming while being beaten but he never went back. He hid and heard motorbikes leave then he went home.

20. He told the court that when he left, he went to Boniface's place. And when he knocked on the door Boniface did not respond, so he thought Boniface was asleep. That the following day about 8.00 a.m. he was called to Boniface's home and told he had been found on the road with injuries. Later he heard that Boniface was admitted in ICU and the following day he met some young men who said he had died. He then went to Njoro Police station and recorded statements. He said he knew Simon and Kamau very well since they went to school together.

21. On cross examination, he testified that although Boniface was drunk none of them was very drunk since they had been talking. He also testified that he had seen Simon beat Boniface and that Simon hit Boniface with a stone.

22. He testified that did not see any injuries on Boniface but insisted that he saw Simon hit Boniface with a stone and kick him and that Boniface was down. That after Boniface escaped, they turned on him (PW4) with kicks and blows.

23. He however confirmed that it was not in his statement to the police that he saw Simon using stones, kicks, and blows to beat Boniface or that of Simon and Kamau beat him up.

24. **PW6** was **Fredrick Miriti Karinga** who testified that on 21<sup>st</sup> December, 2019 at about 11.00 p.m. He was at Maili Tatu Njoro going home to Kamotho. He got three customers i.e. Njoroge, Mwaniki and Nahashon, who were all headed to Kamotho.

25. That Mwaniki alighted at Kisima stage, then Nahashon. That when they reached Njoroge's stage, it was too dark and Njoroge asked that they return to Kisima Stage, where there were '*mulika mwizi*' lights.

26. That at the Kisima Stage, they found five people i.e., Simon, Mwaniki, Maina, Kamau and Boniface. That there was a fight and Kamau and Simon were beating Boniface. Simon was asking for Kshs. 50 while Kamau was asking for Kshs. 100 from Boniface and he did not know why. That Kamau was beating Boniface with kicks and blows and Simon slapped Boniface once on the face. That he, Mwaniki and Njoroge separated them, and the fight was over.

27. He testified that Njoroge then told Boniface to get up and run, after which Boniface crossed the road and ran away towards the direction of his home. That Simon then sat down while Kamau began hitting Njoroge on the stomach. He got hold of Kamau so he could let Njoroge go. That Simon picked a stone and hit Njoroge on his upper back. He let go of Kamau who then let go of Njoroge and Njoroge ran off. He then took his motorbike and left for home leaving Kamau and Simon at the scene.

28. He testified further that the following day at around 8.00 am, there was a story that Boniface had been found unconscious along the route to his home near Kisima stage. That later in the evening, it was said Boniface had died.

29. On cross examination, he testified that Simon only slapped Boniface and it was Kamau who really beat Boniface.

30. **PW5** was **No. 42272 Senior Sergeant Justus Kasusya** attached to Njoro Police Station Crime Office, who testified that on 22<sup>nd</sup> December, 2019 at about 2:30 p.m., one Paul Mugwe father of the deceased came to the Police Station and reported that his son had died at Provincial General Hospital in Nakuru ICU, where they had taken him after picking him at the Junction at Njoro-Molo Road at Ngondu B Town, where they lived. That they found the deceased after being rung and informed that he was in a ditch, and that it was in that ditch they found him with injuries on the head.

31. Upon entering this information in the OB he and Deputy OCS IP Woluuya went to the scene. They also passed by Kisima Stage where it was alleged that the deceased had been hit during an argument where he was accused of failing to pay fare of Kshs. 50 from Maili Tatu to Kisima. Then they then went to the junction at Ngondu B and were shown where he had been found was lying in a ditch. He drew a sketch plan of the scene indicating the direction from the deceased had come, the scene of the alleged attack and where he was found.

32. That he then went back to the police station, (it was a Sunday) he recorded a statement of Brian Njoroge who said he was the last person to be with the deceased on 21<sup>st</sup> December, 2019 and that on 22<sup>nd</sup> December, 2019, through the villagers of Ngondu he learnt that one suspect was at Sobeya.

33. That they arrested that suspect Simon Mugo Kinyanjui and took him to Menengai police station. They then took the suspect to Njoro Police station. That on 24<sup>th</sup> December, 2019, he was added fourteen (14) more days by a Nakuru Court to investigate the crime.

34. On the same day at 2.00 pm he went to PGH at Nakuru, where the postmortem was conducted by Dr. Ngulungu to establish the cause of death.

35. That he continued with the investigations and recorded statements and later the Accused was charged.

36. **PW7 Dr. Titus Ngulungu**, a pathologist at Nakuru County Government Provincial General Hospital testified that he performed a postmortem examination on the body of the deceased at Nakuru Level 5 Hospital on 24<sup>th</sup> December 2019 upon a request from Njoro Police Station. That he was told to examine the body of the deceased and report on the cause of death of the deceased, who he was informed had been found unconscious in a ditch on 21<sup>st</sup> December, 2019 with injuries on the head.

37. He testified that after the body was identified by Paul Mugure, Samwel Ndungu Kimathi and PC Justus Kasusya, he examined the body and found that the deceased was a male African about twenty (20) years of good nutrition and about 170cm height. The body was well preserved.

38. He testified that the body had signs of cyanosis, there was evidence of having been treated through IV canular, had swollen head on the left and right side and no visible injuries.

39. That internally, he found subscarp hematoma, hematoma on the left brain and epidural hematoma. There was a mass effect of this hematoma, it was about 100x70x30 mm, a brain indentation, and no other injuries. He therefore ruled the cause of death as head injury attended by epidural hematoma, blunt force trauma to the head, fatal assault.

40. He further testified that the injury had been caused by a blunt object which was harder than a hand and that a fall could not have cause those injuries save for the possibility of a fall over a long cliff and not in a ditch.

41. He told the court that it was possible for the deceased to have walked after experiencing the hematoma and that the distance walked depended on the type of vessel injured.

#### **Submissions**

42. Defense Counsel's submissions are dated 18<sup>th</sup> June, 2021. The gist of the Defense's submissions is that the prosecution has not proved its case beyond a reasonable doubt. This is because first, PW2, PW3 and PW6 confirmed that a man by the name Kamau is the person who assaulted the deceased and not the Accused. Secondly, that PW4, the only eyewitness has various inconsistencies that make his testimony doubtful. Third, that the investigation officer confirmed not having conducted an identification parade and not conducting adequate investigations into the murder. Fourth, that PW2, PW3, PW4 and PW6 confirmed that the deceased had left the scene healthy and without any visible injuries only to be found dead the next morning. Fifth that PW2, PW3, PW4 and PW6 confirmed that the Accused did not go after the deceased and had remained at the scene.

43. The sixth reason for their argument is that PW4 and PW6, the only eyewitnesses gave contradictory descriptions of how the accused handled the deceased, with PW4 stating that the accused person hit the deceased with his fist and kicked him with his feet and PW6 stating that it was Kamau who hit the deceased with his fists and kicked him with his feet, but the accused person only slapped the deceased. Seventh that the doctor also confirmed that the blunt force trauma that led to the death of the deceased could not have been caused by a human hand, thereby absolving the accused. Lastly, that the doctor confirmed that with the injuries suffered by the deceased, he could not have been able to move a long distance from the point of injury to the point of his death, thus his death could not have been a direct result of the accused's actions.

44. It was the position of the defence that from the foregoing the Prosecution has not established the elements of the offence of murder as required by **Section 203 of the Penal Code**. The evidence adduced had not established proved the element of causation. That there was neither direct nor circumstantial evidence linking the accused to the offence. They relied on the case of **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR**.

45. Further that even if one was to consider circumstantial evidence the prosecution witnesses on the circumstances of the offence were not believable eyewitnesses. The defence urged the court to disregard the evidence of PW4 due to the inconsistencies therein. They relied on the case of **Ahmad Abolfathi Mohammed & another v Republic [2018] eKLR**

46. Relying on the definition of a *prima facie* case given in **Republic vs Jones Mutua Anthony & 3 Others [2019] eKLR** and **Republic vs Nicholas Muasya Bernard & 3 others [2020] eKLR** the defence submitted that that the Prosecution had not established a prima facie case to warrant the accused being put on the defence.

47. The defence further urged the court to find that the Prosecution has not discharged the burden of proof placed upon it by **Section 107(1) of the Evidence Act** and to acquit the accused under **Section 210 of the Criminal Procedure Code**.

#### **Analysis and determination**

48. From the foregoing evidence and submissions, the issue for determination is whether the Prosecution has established a prima facie case to warrant the Accused to be put on his defence as per the Provisions of **Section 306 (2) Criminal Procedure Code** which states.

*“306 (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”*

49. In determining whether a prima facie case has been established the court is required to consider whether there is evidence that the accused person.

*“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. (See **Republic vs. Abdi Ibrahim Owl [2013] eKLR**)*

50. It is the legal duty of the prosecution to establish this prima facie case. In **Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335**, the court stated as follows:

*“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (Emphasis mine)*

51. In **Republic vs Nicholas Muasya Bernard & 3 others [2020] eKLR** the Judge observed;

*“21. The general principle of law on homicide cases is that it is important that the prosecution proves death and also the cause of death. As held in the case of **Republic vs. Kimbugwe S/O Nyagoli & Others (1936) 3 EACA 129** it is cause of the death which often links the accused to the death. As regards proof of death it is usually through medical evidence as stated in the case of **Republic vs. Cheya & Another (1973) EA 500**. In this case, we do not even know if the matter was investigated, by who and what led to the decision to charge the accused persons with the offence. There was neither proof of mens rea nor actus reus in order for the commission of the offence to be proved.”*

52. In our case, both death and cause of death were proved by Dr. Ngulungu through the postmortem report. However, there is no evidence that that accused hit the deceased with any blunt object. The evidence of PW4 about a stone is clearly an afterthought as if it had be so, he would have recorded it in the first instance when his memory was fresh. The only eye witness evidence is the slap which according to the Doctor could not have caused the injuries which led to the death. In addition there is evidence that when the deceased ran away from the scene of the scuffle the accused person did not follow him. This raises the question as to what could have happened after the deceased ran off from the scene leaving the accused person and others at the Stage.

53. What is clear from the evidence is that there was a scuffle among three young men that took another four young men to separate. If the deceased sustained the blunt object injury in that scuffle, what is also clear is that it is not the accused person who inflicted it.

54. I therefore find that the provisions of **Section 306(1) of the Criminal Procedure Code** which states:

**“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”**

Apply to this case;

I therefore record a finding of not guilty and acquit the accused person.

Orders accordingly.

**Dated this 14<sup>th</sup> day of August, 2021.**

**Delivered, and Signed at Nakuru this 28<sup>th</sup> day of September, 2021.**

**Mumbua T. Matheka**

**Judge**

In the presence of:- Via ZOOM

Edna Court Assistant

Ms Murunga for state

Accused present



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